**UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF WISCONSIN**

GABRIEL DE LEON,
RAMON PENA, and
JOSE LUIS RAMIREZ, on behalf of
themselves and
all others similarly situated,

Case No. 16-CV-348

Plaintiffs,

v.

GRADE A CONSTRUCTION, INC.

Defendant.

DEFENDANT'S BRIEF IN OPPOSITION TO PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

INTRODUCTION

Plaintiffs seek certification of a class represented by Jose Luis Ramirez. They define the putative class as: All current and former Grade A employees who either (1) as of May 26, 2016 was [*sic*] not paid at a rate equal to 1.5 times his straight time rate for all banked overtime hours worked between May 26, 2014 and April 25, 2016; and/or (2) was not paid at a rate equal to 1.5 times his straight time rate for all overtime hours worked after April 25, 2016 within 31 days of when the overtime was worked. (Plf. Brf. p. 2).

Because class actions depart from the usual rule that litigation is conducted by and on behalf of individual named parties only, a court may certify a class only after undertaking rigorous analysis to determine whether the party seeking certification has satisfied the requirements of Fed. R. Civ. P. 23. The party seeking certification has the burden of proving that each of the four requirements of Rule 23(a) are met and also of demonstrating the appropriateness of a class action under one of the Rule 23(b) subparts. *Great Neck Capital Appreciation Inv. P'ship, L.P. v. PricewaterhouseCoopers, L.L.P.*, 212 F.R.D. 400 (E.D. Wis. 2002). The rigorous analysis may entail some overlap with the merits of the plaintiff's underlying claim and does not require that a court assume the truth of any allegations. *Jimenez v. GLK Foods, LLC*, No. 12-C-209, 2014 WL 2515398, at *4 (E.D. Wis. June 4, 2014). If there are material factual disputes, the Court must receive evidence and resolve the disputes before deciding whether to certify the class. Hence, merits questions may be considered to the extent that they are relevant to determining whether the plaintiff has satisfied the prerequisites for class certification. *Id.* Failure to meet any one of the requirements of Rule 23 precludes certification. *Valentino v. Howlett*, 528 F.2d 975, 978 (7th Cir. 1976). Because Jose Luis Ramirez has failed to meet each of the prerequisites of Rule 23, the Court should deny their motion for class certification.

ARGUMENT

I. THE PROPOSED CLASS FAILS TO MEET RULE 23(A) REQUIREMENTS.

a. The Proposed Class is Not Sufficiently Numerous.

Rule 23(a)(1) of the Federal Rules of Civil Procedure requires that the members of a putative class must be so numerous that joinder of all members is impracticable. Joinder is generally considered impracticable for classes numbering at least 40 persons. *Reliable Money Order, Inc. v. McKnight Sales Co.*, 281 F.R.D. 327, 332 (E.D. Wis. 2012), *aff'd*, 704 F.3d 489 (7th Cir. 2013); *see also Pruitt v. City of Chicago, Illinois*, 472 F.3d 925 (7th Cir. 2006) (city employees failed to meet numerosity requirement, when there were only 40 possible class members, and there was no showing that joinder of those 40 persons as plaintiffs would be impracticable). If joinder of all plaintiffs would be practical, then all other criteria for class certification do not matter. *Pruitt*, 472 F.3d at 926.

Here, Plaintiffs seek certification of a class of 23 individuals, including representative Plaintiff Ramirez. Plaintiffs argue that district courts in this circuit have held that whether a class of between 20 and 40 potential members is sufficiently numerous depends on the circumstances of the case. (Plf. Brf. p. 6.) However, Plaintiffs' authority involves class members who were geographically diverse, and it was largely for this reason that the courts in those cases certified the class.

For instance, in *Paper Sys. v. Mitsubishi Corp.*, 193 F.R.D. 601, 604 (E.D. Wis. 2000), the class consisted of between 74 and 100 members, residing in 22 states. As a preliminary matter, the class was presumed to be sufficiently numerous because – in contrast to this case – the proposed class contained more than 40 potential members. The court further reasoned that joinder would be impracticable because the class members were spread out across 22 different states.[1] In the case at hand, of the 19 potential class members specifically identified by Plaintiffs [ECF 52-1], twelve are current Grade A employees residing in the Milwaukee area. (*See* Declaration of Daniel Berry ("Berry Decl.") at ¶ 1, Declaration of Rafael Cervantes Perez ("Cervantes Perez Decl.") at ¶ 1, Declaration of Santos Garcia ("Garcia Decl.") at ¶ 1, Declaration of Alejandro Gonzalez Guerrero ("Gonzalez Guerrero Decl.") at ¶ 1, Declaration of Timothy Luce ("Luce Decl.") at ¶ 1, Declaration of Alejandro Magana ("Alejandro Magana Decl.") at ¶ 1, Declaration of Alfonso Magana ("Alfonso Magana Decl.") at ¶ 1, Declaration of Todd Paaske ("Paaske Decl.") at ¶ 1, Declaration of Scott Phillips ("Phillips Decl.") at ¶ 1, Declaration of Manuel Rodriguez Ayala ("Rodriguez Ayala Decl.") at ¶ 1, Declaration of Darin L. Scheel ("Scheel Decl.") at ¶ 1, Declaration of Michael A. VanZeeland ("VanZeeland Decl." at ¶ 1.) Of the seven individuals no

[1] Similarly, in *Peoples v. Sebring Capital Corp.* 2002 WL 406979, at *6 (N.D. Ill. Mar. 15, 2002), at least 27 of the 38 potential class members resided in various judicial districts, and it was largely for this reason that the court held that joinder of all members was impracticable.

longer employed by Grade A, one now works as a subcontractor, and Ramirez himself says that at least two others still reside in the Milwaukee area. (Declaration of Joseph S. Goode ("Goode Decl."), Ex. A., Ramirez Dep. at 36:18-37:3; 37:24-25.) This leaves four individuals who may or may not live in the Milwaukee area – and Plaintiff does not carry his burden because he does not tell the Court where the four others reside. This hardly qualifies as the kind of geographic diversity that would make joinder impracticable.

Plaintiffs also argue that the Court should consider future Grade A employees when assessing Rule 23's numerosity requirement, relying on *Rosario v. Cook County,* 101 F.R.D. 659, 661-66 (N.D. IL 1983). In that outlier case, the court considered the interests of potential future class members when determining impracticability of joinder where the record showed not only that the defendant's use of illegal procedures was ongoing **and** defendants intended to continue using the procedures going forward. Therefore, in that specific instance, the court held that it was not speculative to predict that the interests of future potential class members should be considered.

In contrast, Grade A no longer permits its employees to bank their overtime hours. (Declaration of James Yaresh ("Yaresh Decl.") at ¶ 7), and Grade A's payroll records demonstrate that all overtime is now paid without consideration of banking hours. All overtime hours are now paid in full on the paycheck corresponding with the week during which the overtime hours were worked. (*Id.* at ¶ 9). Therefore, any reliance on future class members would be purely speculative and as a result, improper. Plaintiffs have failed to establish that joinder is impracticable and have failed to meet the numerosity requirement of Rule 23(a)(1). Class certification should be denied on this ground alone.

b. Proposed Class Members Have Not Suffered the Same Injury.

Plaintiffs' complete failure to meet Rule 23(a)(1)'s numerosity requirement makes it nearly impossible to address the commonality requirement. While Ramirez may have individual claims against Grade A, Plaintiffs have failed to demonstrate that a class of individuals shares those claims. Commonality requires the plaintiff to demonstrate that class members have suffered the same injury, not merely that they have all suffered from a violation of the same provision of law. *Reliable Money Order, Inc. v. McKnight Sales Co.*, 281 F.R.D. 327, 332–33 (E.D. Wis. 2012), *aff'd*, 704 F.3d 489 (7th Cir. 2013). Plaintiffs cannot even establish that a viable potential class exists numerically, let alone that the alleged putative class has suffered the same injury as Ramirez.

Plaintiffs have identified, at most, 23 individuals, including Ramirez, as potential class members. Twelve of these individuals have already made it clear that they disagree with Ramirez's efforts in this case, that they do not join in his allegations against Grade A, and that they have not suffered any injury at all, let alone the same injury claimed by Ramirez. (*See* Berry Decl. at ¶¶ 2-6, Cervantes Perez Decl. at ¶¶ 2-6, Garcia Decl. at ¶¶ 2-6, Gonzalez Guerrero Decl. at ¶¶ 2-6, Luce Decl. at ¶¶ 2-6, Alejandro Magana Decl. at ¶¶ 2-6, Alfonso Magana Decl. at ¶¶ 2-6, Paaske Decl. at ¶¶ 2-6, Phillips Decl. at ¶¶ 2-6, Rodriguez Ayala Decl. at ¶¶ 2-6, Scheel Decl. at ¶¶ 2-6, VanZeeland Decl. at ¶¶ 2-6.) In fact, all twelve of these individuals would still prefer to bank their overtime hours, but Grade A no longer permits them to do so. (*Id.* at ¶ 6). Plaintiffs have done nothing more than allege a violation of the same provision of law, which the Seventh Circuit and the United States Supreme Court have both explicitly stated is not enough to establish commonality under Rule 23. *See Reliable Money Order, Inc. v. McKnight Sales Co.*, 281 F.R.D. 327, 332–33 (E.D. Wis. 2012), *aff'd*, 704 F.3d 489 (7th Cir. 2013); *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011). Based on this failure to satisfy commonality under Rule 23(a), class certification can and should be denied.

c. The Claims of the Class Representative are not Typical of Class Claims.

Under Rule 23(a)(3), typicality is satisfied if the class representative's claims have the same essential characteristics as the class members' claims. *Holmes v. Roadview, Inc.*, No. 15-CV-4-JDP, 2016 WL 1466582, at *3 (W.D. Wis. Apr. 14, 2016). As discussed in greater detail in the adequacy subsection below, Ramirez's claims are not typical of at least the majority of the potential class members' claims. Ramirez claims that he was **required** by Grade A to bank his overtime hours. (Goode Decl., Ex. A, Ramirez Dep. at 24:14-25:2.) He claims that banking of overtime hours was a uniform and routine Grade A practice and that **no one** was ever timely paid for their overtime hours. (*Id.* at 26:19 – 27:24). Yet, the twelve current Grade A employees who have been identified by Plaintiffs as potential class members all claim that it was their choice to bank their overtime hours, that they preferred to bank their overtime hours, that Grade A never required them to bank their overtime hours, and that Grade A did not have a policy requiring employees to bank their overtime hours. (*See* Berry Decl. at ¶¶ 2-5, Cervantes Perez Decl. at ¶¶ 2-5, Garcia Decl. at ¶¶ 2-5, Gonzalez Guerrero Decl. at ¶¶ 2-5, Luce Decl. at ¶¶ 2-5, Alejandro Magana Decl. at ¶¶ 2-5, Alfonso Magana Decl. at ¶¶ 2-5, Paaske Decl. at ¶¶ 2-5, Phillips Decl. at ¶¶ 2-5, Rodriguez Ayala Decl. at ¶¶ 2-5, Scheel Decl. at ¶¶ 2-5, VanZeeland Decl. at ¶¶ 2-5.) There is no question that the claims and alleged experiences of Ramirez are not typical of the claims and experiences of the potential members of the class he seeks to represent. Accordingly, class certification should be denied.

d. Ramirez Is Not An Adequate Representative Of The Putative Class.

Rule 23(a)(4) requires that the representative parties will fairly and adequately protect the interests of the class. Adequate representation is also constitutionally required to afford due process. *Great Neck Capital Appreciation Inv. P'ship, L.P. v. PricewaterhouseCoopers, L.L.P.*, 212 F.R.D. 400 (E.D. Wis. 2002). The two key factors in assessing adequacy of representation are an absence of potential conflict between the named plaintiff and absent class members, and an assurance of vigorous prosecution on behalf of the class. Therefore, for a class to be certified, both the named plaintiff and class counsel must be able to serve the interests of the entire class. *Id.* at 408. The class representative has an obligation to represent the interests of the class in dealings with both the defendant and class counsel. One purpose of the adequacy inquiry for class action certification is to uncover conflicts of interest between named parties and the class they seek to represent. *In re Sw. Airlines Voucher Litig.*, 799 F.3d 701 (7th Cir. 2015).

In this case, there is a fundamental disconnect between the interests of the potential class members, particularly the twelve current Grade A employees who purportedly make up more than half of the putative class, and the interests of Ramirez. Ramirez repeatedly testified that he was not concerned with other Grade A employees and was only concerned with himself (Goode Decl., Ex. A, Ramirez Dep. at 21:20-22:2; 22:19-23:3; 33:2-7), which is a far cry from the requirement that the class representative vigorously represent **the interests of the class**. Ramirez wants the money Grade A purportedly owes him and does not care what impact this litigation has on Grade A's future financial viability and consequently on the individuals employed by Grade A (*id.* at 35:15-19; 35:25-36:2), which runs counter the class representative's obligation to avoid actual and potential conflicts with his fellow class members. Further, Ramirez testified that he is unaware of any Grade A employees who preferred to have their overtime hours banked (*id.* at 32:6-9) (even though we know of at least twelve, given the sworn declarations submitted in this case), that he is unaware of Grade A paying anyone overtime rather than having their overtime hours banked (*id.* at 32:10-13) (even though Grade A always did so when the employee chose not to bank their overtime), and that Grade A automatically banked every employee's overtime hours (*id.* at 26:19-25) (which is simply made up without any personal knowledge).

Notably, Grade A's payroll records show that Ramirez was paid overtime in both May and July of 2016. (Goode Decl., Ex. B, Payroll Records of Jose Luis Ramirez). Ramirez's assertions are contradicted not only by Grade A's payroll records but also by Jim Yaresh and numerous current Grade A employees. To the extent Grade A's current employees banked their overtime hours in the past, none of them believed that banking of overtime hours was required by Grade A, and each employee who banked his hours did so by choice. (*See* Berry Decl. at ¶¶ 2-5, Cervantes Perez Decl. at ¶¶ 2-5, Garcia Decl. at ¶¶ 2-5, Gonzalez Guerrero Decl. at ¶¶ 2-5, Luce Decl. at ¶¶ 2-5, Alejandro Magana Decl. at ¶¶ 2-5, Alfonso Magana Decl. at ¶¶ 2-5, Paaske Decl. at ¶¶ 2-5, Phillips Decl. at ¶¶ 2-5, Rodriguez Ayala Decl. at ¶¶ 2-5, Scheel Decl. at ¶¶ 2-5, VanZeeland Decl. at ¶¶ 2-5.) In fact, these employees would still prefer to have their hours banked, but Grade A no longer permits its employees to do so as a result of this lawsuit. (*Id.* ¶ 6; Yaresh Decl., ¶¶ 8-9). It is clear from Ramirez's testimony that his interests directly conflict with the interests of the individuals who make up the majority of Plaintiffs' proposed class and that he really does not much care for his fellow class members. For this reason, Ramirez is not an adequate class representative and class certification can be denied on this basis as well.

II. THE PROPOSED CLASS FAILS TO MEET RULE 23(B)(3) REQUIREMENTS.

In addition to meeting the four Rule 23(a) requirements, a proposed class action must also satisfy one of the three alternatives in Rule 23(b). When class certification is sought under Rule

23(b)(3), which is the case here, on the basis of predominance and superiority requirements, proponents of the class must show: (1) that the questions of law or fact common to the members of the proposed class predominate over questions affecting only individual class members, and (2) that a class action is superior to other available methods of resolving the controversy. *Messner v. Northshore Univ. HealthSystem*, 669 F.3d 802 (7th Cir. 2012). While similar to Rule 23(a)'s requirements for typicality and commonality, "the predominance criterion is far more demanding." *Id.* at 814 (citing *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 623 (1997)). As discussed above, Plaintiffs have failed to meet the less demanding typicality and commonality requirements of Rule 23(a). Plaintiffs cannot establish that the potential class members suffered the same injury as Ramirez, nor can they establish that Ramirez's claims are typical of the potential class members' claims. Twelve of the 23 potential class members have explicitly stated that Grade A never required them to bank their overtime hours, that they banked their overtime hours by choice, that if they wanted to be paid overtime Grade A paid them overtime, and that they would continue banking their overtime hours but Grade A no longer permits employees to do so. (*See* Berry Decl. at ¶¶ 2-6, Cervantes Perez Decl. at ¶¶ 2-6, Garcia Decl. at ¶¶ 2-6, Gonzalez Guerrero Decl. at ¶¶ 2-6, Luce Decl. at ¶¶ 2-6, Alejandro Magana Decl. at ¶¶ 2-6, Alfonso Magana Decl. at ¶¶ 2-6, Paaske Decl. at ¶¶ 2-6, Phillips Decl. at ¶¶ 2-6, Rodriguez Ayala Decl. at ¶¶ 2-6, Scheel Decl. at ¶¶ 2-6, VanZeeland Decl. at ¶¶ 2-6.) Plaintiffs have failed to meet the predominance requirement of Rule 23(b)(3), and class certification should be denied.

CONCLUSION

For the above stated reasons, Plaintiffs' Motion for Class Certification should be denied, on the points and authorities herein.

Dated this 12th day of May, 2017.

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By: *_/s/Joseph S. Goode_*

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